IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 334 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)

Versus

MAHENDRA R DIVECHA - Respondent(s)

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Appearance :
MR KM PARIKH for the applicant - revenue

NOTICE SERVED for Respondent - Assessee
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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 26/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench "A" under Section 256(2) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

> "Whether, the Tribunal is right in law and on facts in holding that the provisions of Section 10(3) have been wrongly invoked by the ITO in bringing to tax the consideration received by the assessee in lieu of surrender of tenancy rights ?"

2. The assessment year is 1982-83 and the relevant accounting period is 31st March 1982. The assessee, an individual, was a statutory tenant. On surrender of his tenancy rights, he got residential premises in another housing society at a cost of Rs.60,000/-, and such cost was paid by the purchaser of the tenancy rights, on behalf of the assessee. The Assessing Officer adopted the market value of property at a sum of Rs.80,000/- and after allowing statutory deduction of Rs.1,000/-, taxed the assessee on an income of Rs.79,000/- under Section 10(3) of the Act.

3. On appeal, the Deputy C.I.T. (Appeals) held that provisions of Section 10(3) of the Act could not be invoked since the present transaction had resulted in capital receipt which could be brought to tax only

under Section 45 of the Act.

4. The Revenue carried the matter in appeal before the Tribunal and placed reliance on decision of the Allahabad High Court in case of CIT v. Gulabchand, 192 ITR 495. The Tribunal, however, did not accept the contention raised on behalf of Revenue, and following the Apex Court decision in case of A.Gasper v. CIT, 192 ITR 382, confirmed the order of Dy. CIT (Appeals).

5. Mr.K.M.Parikh, the learned standing counsel for the applicant – revenue has been heard. Though served, there is no appearance on behalf of respondent.

6. Mr.Parikh has very fairly invited attention to the decision of the Apex Court in case of Commissioner of Income Tax v. D.P.Sandu Bros., [2005] 273 ITR 1, to point out that the issue raised stands concluded in favour of the assessee by the judgement of the Supreme Court. In this fact situation, it is not necessary to set out the contentions in detail.

7. Applying the ratio of the Apex Court decision in case of Commissioner of Income Tax v. D.P.Sandu Bros. (supra), it is clear that tenancy rights is a capital asset and surrender thereof would attract Section 45 of the Act so that the consideration received on transfer would be a capital receipt assessable under the head “capital gains” only. Such consideration cannot be

treated as a casual and non-recurring receipt under Section 10(3) so as to bring it to tax under Section 56 of the Act.

8. In the result, the question is answered in the affirmative i.e. in favour of the assessee and against the revenue. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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